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Should a Physician's Medical License Be Permanently Revoked or Suspended for Three Years If He or She Violates Proposed Legislation Creating New Medical Waste Anti-Dumping Laws?

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In the last year, there has been a great deal of publicity about a health care professional who allegedly dumped medical waste into the Atlantic Ocean over the Labor Day holiday. As a result of this incident, Senator Jeff Van Drew (D-1) introduced S-2190 on October 6, 2008, which would mandate that a health care professional who willfully, illegally, or improperly dumped medical waste would have his or her medical license permanently revoked. This bill is pending in the Senate Commerce Committee.

Assemblymen Matthew W. Milam (D-1), Nelson T. Albano (D-1) and Louis D. Greenwald (D-6) introduced A-3270 and A-3290 which would suspend the health care professional's medical license for three years. Section 5 of ACS 3270 and 3290 provides that "if, after a hearing, the Commissioner of Environmental Protection or Commissioner of Health and Human Services determines that a violation of . . . any rule or regulation . . . has been committed by a health care professional, then the appropriate provisional licensing board . . . after a hearing, shall suspend or otherwise limit for at least three years for each offense . . ." (emphasis added).

This section is problematic for several reasons. Those governmental departments do not have the authority to regulate a health care professional and conduct a hearing before the health care professional's licensing board conducts its own proceedings.

The legislation would also permit the licensing board to revoke the license under certain circumstances. In addition, the Assembly Committee Substitute states that the establishment of "substantial civil and criminal penalties for violations thereof will deter unlawful behavior . . ." A person who intentionally dumps any material into the "waters" is guilty of a crime of the third degree.

Furthermore, a health care professional whose license has been suspended for at least three years or revoked would be listed on the "Illegal Medical Waste Disposal License and Registration Revocation List," maintained by the Division of Consumer Affairs, and the list would be posted on the websites of the Department of Law and Public Safety and the Department of Environmental Protection.

On October 24, 2008 the Assembly Committee Substitute was reported out of Committee and the bill passed in the Assembly by a vote of 78 to nothing. The bill is now pending in the Senate Commerce Committee.

"Knowingly and purposefully dumping medical waste off our beaches is irresponsible and just plain stupid," said Milam. "Any doctor that would be so cavalier with the public's health and safety should automatically forfeit their right to practice in New Jersey."

New Jersey's physicians are regulated by the New Jersey State Board of Medical Examiners ("BME"). The 21-member BME is mandated to license and discipline physicians, podiatrists, physician assistants, nurse midwives and other professionals and to determine if a licensee has violated any law or regulation.

While the BME has broad statutory authority to grant licenses or take disciplinary action, it must provide its licensees with "abundant protection." *Matter of Polk*, 90 N.J. 550 (1982). Before the BME can deny, suspend or revoke a license, it must afford the physician with notice and an opportunity to request a hearing.

The BME must act in accordance with explicit statutory standards. The BME may initiate disciplinary action if a health care professional has violated the Medical Practice Act (N.J.S.A. 45:9-1, et seq.) or engaged in incompetence, misconduct, gross or repeated malpractice or negligence. N.J.S.A. 45:1-21. State court and administrative law decisions have determined the types of conduct that constitute a violation of those terms and the validity of penalties imposed upon physicians and others.

The permanent revocation of a medical license is the most severe penalty that the BME may impose upon a health care professional. In fact, such a penalty is rarely invoked. Even a three-year period of suspension, as is called for in the Assembly Committee Substitute, is a substantial penalty reserved for the most egregious matters.

These new penalties are unusual in that the Courts have held that the licensing boards have the authority to implement their own laws and regulations and to determine what constitutes a violation of those laws. The Appellate Court rarely strikes down a penalty imposed upon a licensee.

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There are extensive procedures already in place if there is a complaint to the BME that a health care professional violated a standard of practice. The BME may even file a complaint for a temporary suspension of a license if there is an imminent danger to the public.

If the BME finds sufficient cause to instigate a disciplinary action, it may direct a Deputy Attorney General to negotiate a Consent Order, which is an agreement between the State and the health care professional that the particular practice must stop.

The Consent Order must adhere to parameters set by the BME and the Attorney General. A Consent Order may include: reprimand; terms of probation; assessment of costs and penalties; restitution for monies paid; and suspension or revocation of a license. According to the law, the BME may assess a penalty of not more than \$10,000.00 for the first violation and \$20,000.00 for the second and subsequent violation. N.J.S.A. 45:1-25. All Consent Orders must be reported to the National Practitioners Data Bank

If the investigation is not resolved with a Consent Order, the BME may file a Complaint, which is usually transmitted to the Office of Administrative Law for a hearing. The Administrative Law Judge ("ALJ") makes findings of fact and conclusions of law and recommends disciplinary and financial sanctions, which must be affirmed, denied or modified by the BME. If the BME modifies or rejects that ALJ's recommendations, the BME must state its reasons.

The Court has held that "any conduct which, if permitted to continue, would threaten the health or welfare of the public could constitute misconduct." Board of Pharmacy v. Yanuzzi, 4 N.J.A.R. 489 (1981). It went on to state that "for purposes of this section, which relates to suspension of a professional license for engaging in professional or occupational misconduct or for violation or failure to comply with provisions of any act or regulation administered by the board, the focus should be upon the effect of the activities by the professional upon the public, without regard to his or her intentions" (emphasis added).

Thus, the current law appears to authorize the BME (and the other professional licensing boards) to suspend, for a significant period of time, the license of a health care professional who dumps medical waste into the ocean. The standards for disciplining a physician or other health care professional are well settled and the licensing boards are in the best positions to review the facts and determine the appropriate penalty. Mandating a set penalty undermines the licensing boards. Adding a new law to the books may confuse, rather than clarify the law.

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